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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

In re: EMILIO J. LAGUNA, JR.
and CYNTHIA LAGUNA,
Debtors,
SHEARSON LEHMAN MORTGAGE CORPORATION,
Petitioner,
vs.
EMILIO J. LAGUNA, JR.
and CYNTHIA LAGUNA, Debtors;
LAWRENCE J. LOHEIT, Trustee,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals err in affirming the Bankruptcy Court's Order which confirmed a Chapter 13 plan over the objection of a secured creditor/home-mortgage lender where the plan failed to provide postpetition interest on a prepetition oversecured claim?

PARTIES TO THE PROCEEDING

Petitioner and all Respondents are named in the caption and were also parties before the United States Ninth Circuit Court of Appeals.

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LAWRENCE J. LOHEIT, Trustee

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, **EMILIO J. LAGUNA** and **CYNTHIA LAGUNA**, respectfully submit a Brief in Opposition to a Writ of Ceriorari to review the judgement of the United States Court of Appeals for the Ninth Circuit.

I

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) to review the final decision of the Ninth Circuit Court of Appeals, filed on September 11, 1991 and officially reported at 944 F.2d 542 (9th Cir. 1991)

II

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions, statutes and regulations: 11 U.S.C. Sections 109(e), 1322(b)(2),1322(b)(5),1325(a)(5)(B)(ii) and the Fifth Amendment of the United States Constitution.

III

STATEMENT OF THE CASE

A. Nature of the Case and Procedural Background

Respondents adopt Petitioner's description of the Nature of the Case and Procedural background.

B. Statement of Facts

The relevant facts are not in dispute and Respondents adopt Petitioner's Statement of Facts.

IV

REASONS FOR DENYING THE WRIT

A. THERE IS INSUFFICIENT CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER OR NOT A SECURED CREDITOR IS ENTITLED TO POSTPETITION INTEREST ON A PREPETITION SECURED CLAIM TO JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI.

All Circuits, save one, who have dealt with the question at bar have determined that 11 U.S.C. Sections 1322(b)(2) and (5)[1] prohibit the payment of the interest on arrearages to a creditor holding solely a security interest in the debtors' principal residence unless the contract between the parties provides such interest.

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[1] U.S.C. Sections 1322(b)(2) and (5) provide in pertinent part:

The plan may---

* * *

(2) Modify the rights of holders of security claims, other than a claim secured only by a security interest in the real property that is the debtor's principal residence, or of holders of unsecured claims;

* * *

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending....

See, e.g. In re Capps, 836 F.2d 774 (3rd Cir., 1987); In re Terry, 780F.2d 894 (11th Cir. 1985); In re Landmark Financial Services,918 F. 2d 1150 (4th Cirl, 1990). Additionally, bankruptcy courts in other circuits have ruled such prohibition is in line with preceding decisions by their circuit courts. See e.g. In re Adams, 120 B.R. 517 (Bankr. E.D. Mo., 1990); In re Penick, 108 B.R. 776 (Bankr. W.D. Okla., 1989); and In re Siegfried, 114 B.R. 358 (Bankr. N.D. N.Y., 1990)

In contrast, only the Sixth Circuit In re Colgrove,771 F.2d 119 (6th Cir., 1985) has held that interest may be payable to an over secured creditor on prepetition mortgage arrearages even absent a provision for such in the loan agreement and even in light of 11 U.S.C.

Section 1322 (b)(2) which bars modification of such loan agreements. This seemingly aberrant decision by the Sixth Circuit is insufficient to justify the granting of a writ of certiorari.

In dilution of the impact of the Colgrove decision are the facts that Senior Judge Celebrezze expressed a diametrically opposed view in dissent, no other circuit has adopted the Colgrove majority's reasoning, and the decision has been strongly criticized by the leading bankruptcy treatise (See Collier, paragraph 1322.09, at 1322-22 and 1322-23). Even the Colgrove court itself indicated a retreat in its subsequent decision in United States of America v. Arnold 878 F.2d 925 (6th Cir., 1989). In Arnold, the Sixth Circuit seemingly contradicted itself by

indicating that while the contract cannot be modified to alter an agreed to interest rate, it could be modified to allow interest. The court further quoted a Michigan bankruptcy court's statement that "Colgrove creates a narrow exception to the general rule...". (In re Arnold at 930).

Thus, the Sixth Circuit's Colgrove decision stands alone and unsupported even by its own subsequent decisions. This singular departure from the clearly accepted rule is of insufficient conflict to merit the issuance of a writ of certiorari.

B. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY INTERPRETED AND APPLIED THE RELEVANT STATUTES.

The citing of this Court's decision in United States v. Ron Pair Enterprises, Inc. 489 U.S. 235, 109 S.

Ct. 1026, 103 L.E.D. 2d 290 (1989) is a red herring which was properly distinguished by the Ninth Circuit. While it has never been contested that 11 U.S.C. Section 506(b)[2] applies in Chapter 13 cases, this section must be viewed in the different context of Chapter 13 and its unique provision, 11 U.S.C. Section 1322(b). This view was the one taken by the Ninth Circuit and this is why its decision is neither in conflict with Ron Pair nor a failure to follow that ruling.

The Ninth Circuit emphasized rather than ignored the ruling of Ron Pair.The

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[2] 11 U.S.C. Section 506(b) provides in pertinent part:

> To the extent that an allowed secured claim is secured by property the value of which,..., is greater then the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim,...

Ninth Circuit properly noted the cautious approach of this Court to the allowance of charges which could work to thwart the purpose of reorganization type bankruptcy proceedings. The court noted the purpose of 11 U.S.C. Section 1322 (b)(2) was to serve as a shield for creditors from the cram down and write down provisions otherwise available in Chapter 11 cases like Ron Pair and therefore refused to allow it to be used as a sword against Chapter 13 debtors to force a windfall of interest not part of the original bargain.

The Ninth Circuit properly followed this Court's directive as contained in Ron Pair and merely applied such within the context of a Chapter 13 proceeding and the applicable requirements of 11 U.S.C. Sections 1322(b) and 1325(a).

Thus a review is unnecessary as there is no departure from this Court's ruling.

C. THE NINTH CIRCUIT CORRECTLY CONSIDERED THE PLAIN LANGUAGE OF THE STATUTE AND LEGISLATIVE HISTORY OF CHAPTER 13 AND SECTION 1322(b)(2) IN PARTICULAR, WHEN IT RULED SECURED CREDITORS WERE NOT ENTITLED TO POSTPETITION INTEREST ON PREPETITION ARREARAGES.

The plain language of the applicable statues as well as analysis of the legislative intent behind such statutes justifies the Ninth Circuit's decision. It has always been Respondents' contention that only a plain reading of Sections 1322(b) and 1325 (a) is all that is necessary to properly decide the issue at bar. The courts in In re Terry 780 F. 2d 24 (2nd (Cir. 1982), In re Capps 836 F. 2d 119 (6th Cir. 1985), In re Landmark Financial Services 918 F. 2d 894 (4th Cir., 1985) joined the Ninth Circuits decision in Laguna in properly

concluding that the cure provision of Section 1322(b)(5) stands alone and does not implicate other sections of the code.

To require that interest be paid on arrears when the contract does not call for such would be to impermissably modify the mortgage contract adversely to the Debtor in violation of 11 U.S.C. Section 1322(b)(2). If 11 U.S.C. Section 1325(a)(5)(B)(ii) is read as being applicable in the context of an 11 U.S.C. 1322(b)(5) cure, requiring interest on arrearages where the mortgage contract fails to provide for such, the secured creditor would get a benefit for which it never bargained. The Bankruptcy Code should not be read to provide either Debtors or Creditors with windfalls.

The legislative history supports this view that the only "modification" allowed under 11 U.S.C. Section 1322(b)(2)'s bar was a "cure" under 11 U.S.C. Section 1322(b)(5). While it is true that Section 1322(b)(5)'s preface "not-withstanding paragraph (2)," seems to treat the power to cure in (b)(5) as a subset of the power to modify set forth in (b)(2), that superficial reading of the statute must fall in the light of legislative history and legislative purpose. The "not with-standing" clause was added to Section 1322(b)(5) to emphasize that defaults in mortgages could be cured notwithstanding Section 1322(b)(2), not to dilute the restriction of 1322(b)(2) nor to open mortgage contracts to modifications. See 124 Cong. Rec. H 11,106 (Sept. 28, 1978); S.

17,423 (Oct. 6, 1978).

In fact, earlier Senate bills along with House bills and the present statute listed the power to cure and the power to modify in different paragraphs, indicating that the power to cure is different from the power to modify. Testimony submitted on behalf of secured creditors distinguished between modifying a claim (by reducing payments due thereon) and curing a default (and maintaining those payments). See Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. 1st Sess. 1027.

Finally, the few cases under Chapter 13 of the old Bankruptcy Act distinguished between modifying a claim and maintaining payments thereon, see Hallenbeck v. Penn Mutual Life Insurance

Co. 323 F.2d 566 (4th Cir., 1963); In re O'Dell, 198 F.Supp. 389, 391 (D. Kan. 1961) and indicate that curing a default and maintaining payments on a claim did not modify that claim. See In re Delany, 534 F. 2d. 645, 646, (5th Cir. 1976) (per curiam); In re Howard, 344 F. Supp. 1138 (E.D. Ark. 1971).

Thus, clearly the Ninth Circuit observed both the plain language of 11 U.S.C. Section 1322(b)(2) and the history which produced it. What the Ninth Circuit failed to do was thwart the congressional intent of the statute through an interpretation blurring the clear distinction between cure and modification of the rights of either debtors or creditors.

No further reading of the statute is necessary through a review of the

Ninth Circuit's decision. Its plain meaning is clear as found in that decision.

D. THE ONLY IMPACT OF DISALLOWING POSTPETITION INTEREST ON PREPETITION ARREARAGES OF SECURED CREDITOR HOME MORTGAGE LENDERS IS CONFIRMATION OF THE RULE THAT PARTIES TO A CONTRACT ARE HELD TO THEIR BARGAIN.

The impact of the Ninth Circuit's decision on home mortgage lenders decried by Petitioner is merely a mental one. As the Ninth Circuit indicated in resolving the Fifth Amendment argument of Petitioner, the mortgage company is not being deprived of its property, either in principal or interest, since the cure merely reinstates the parties' original agreement. The creditor received what it originally bargained to receive and accepted in the loan agreement. It could have bargained for in-

terest on arrearages, but failed to do so. Thus, it cannot now complain is not receiving something it did not expect to receive.

Petitioner on one hand argues that Congress could not have intended for mortgage lenders to be excluded from the class of creditors entitled to interest on arrearages and yet on the other hand argues that mortgage lenders are unique and thus entitled to unique protection. Petitioner would have this Court emphasize the protection of creditors under 11 U.S.C. Section 1322(b)(2) and ignore the plain language and protection of debtors under the same statute. No other secured creditors are protected from modification of their contracts. They are instead subject to cram downs and write downs. If mortgage lenders

wish to be treated as other secured creditors in terms of interest, let them waive their unique protection under 1322 (b)(2) and be treated to modification of their contracts as well. Petitioner wishes to have its cake and eat it too.

The intention of Congress to protect mortgage lenders from cram downs and to preserve, but not enhance the bargained expectations of the parties was affirmed by this Court recently in Dewsnup v. Timm No. 9-741 (Jan. 1992) 92 Daily Journal D.A.R. 690. Similarly protection against modification pertains to interest charges as well and needs no further affirmation. Section 1322(b)(5) requires that defaults must be cured within a "reasonable time". Thus the bankruptcy judge has discretion to determine if the length of repayment pro-

posed is reasonable in light of the lack of interest and delayed cure. The bargain of the parties need not be modified.

The increased number of bankruptcies cited by Petitioner is certainly appalling, but a review of the Ninth Circuit's decision and a reversal or affirmation of that decision would not reverse this trend. Affirmation would continue the status quo keeping existing contracts in place and limiting the parties to their bargains. It could cause adjustments to the bargains being negotiated on home loans from here on, but would not adversely affect the terms of existing contract and expectations of the parties thereto. A reversal would likely cause an increase in Chapter 7 filings in relation to Chapter 13's as

fewer home owners would be able to propose reasonable and affordable plans when interest is added to the requirement for cure. This would directly defeat the purpose of Chapter 13.

Legislative intent makes clear that Congress did not want the most common secured creditor and generally the only oversecured creditor in Chapter 13 cases, the mortgage holder, to be deprived of the benefits of its bargain. However, it is equally clear that such creditor was not intended to receive unbargained for benefits at the expense of debtors already burdened by plan requirements of maintaining on going payments and curing delinquencies simultaneously.

Unlike Chapter 11 proceedings where the debtors are savvy commercial con-

cerns, and cram downs are common, the debt limit restrictions of 11 U.S.C. Section 109(e) indicate that Congress recognized that Chapter 13's would be utilized by homeowning consumers. Chapter 13 debtors are individuals or small business owners willing and able to pay what they owe, but unable to wheel and deal their way to complicated, structured reorganization.

The loss of "millions of dollars" referred to by Petitioner is the loss of fictional dollars--dollars not bargained for nor anticipated by either party when the loans were made. A reversal of the Ninth Circuit would make these fictional dollars real as the Chapter 13 debtors would have to come up with these dollars to pay the mortgage lenders. This is the real impact and a reason for not

reviewing the lower court's decision. To leave the decision stand preserves the status quo actual and realistic expectations of the parties.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit this Court should deny the Petition for Writ of Certiorari.

February 18, 1992

Respectfully submitted,

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